BAX GLOBAL (MALAYSIA) SDN BHD A

v.

SUKHDEV SINGH PRITAM SINGH & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
HADHARIAH SYED ISMAIL JC
[JUDICIAL REVIEW NO: R3-25-162-2009]
29 MARCH 2010

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Application to quash Industrial Court award holding that 1st respondent constructively dismissed by applicant - Chairman who handed down award was not Chairman who heard case - No prejudice to applicant when case not heard de novo - Chairman's findings on redundancy wholly unsupported by evidence - Industrial Court's ruling on constructive dismissal instead of redundancy a jurisdictional error of law - Backwages and compensation, principles of - Industrial Relations Act 1967, s. 23(6)* C D

LABOUR LAW: *Employment - Termination of service - Certiorari - Application to quash Industrial Court award holding that 1st respondent constructively dismissed by applicant - Chairman who handed down award was not Chairman who heard case - No prejudice to applicant when case not heard de novo - Chairman's findings on redundancy wholly unsupported by evidence - Industrial Court's ruling on constructive dismissal instead of redundancy a jurisdictional error of law - Backwages and compensation, principles of - Industrial Relations Act 1967, s. 23(6)* E F

LABOUR LAW: *Industrial Court - Award - Certiorari - Application to quash Industrial Court award holding that 1st respondent constructively dismissed by applicant - Chairman who handed down award was not Chairman who heard case - No prejudice to applicant when case not heard de novo - Chairman's findings on redundancy wholly unsupported by evidence - Industrial Court's ruling on constructive dismissal instead of redundancy a jurisdictional error of law - Backwages and compensation, principles of - Industrial Relations Act 1967, s. 23(6)* G H

This was the applicant's application for an order of *certiorari* to quash the Industrial Court's award holding that the 1st respondent had been constructively dismissed by the applicant, and awarding RM252,000 as backwages and compensation *in lieu* of reinstatement. The 1st respondent held the position of General Manager of Facilities, Security & Risk Management at the material I

time. Due to a reorganisation exercise in the company, he was issued a letter dated 3 June 2002 informing him that his position had become redundant and that his services were no longer required. He was offered an alternative position as Manager of Security Facilities in Kuala Lumpur with the same salary and benefits he previously enjoyed. The 1st respondent did not confirm acceptance of the new position and also did not report for duty as required by the company. He instead walked out of the company and lodged a complaint with the Industrial Relations Department, claiming constructive dismissal. The main issue requiring determination was whether the 1st respondent was constructively dismissed or whether it was a case of redundancy. The court also needed to address the issue that the Chairman of the Industrial Court who handed down the award was not the Chairman who heard the case.

Held (allowing the application with costs):

(1) Given a literal interpretation, it is clear that s. 23(6) Industrial Relations Act 1967 ('IRA') allows another chairman to continue hearing a part-heard case. To say otherwise would be contrary to Parliament's intention of enacting the IRA to ensure the speedy disposal of industrial disputes. Quite apart from the interpretation of the law, irrespective of whether it is a civil or trade dispute, the ultimate goal desired by any court is the speedy disposal of cases. In this instance, it would cause grave hardship to order the case to be heard *de novo*. The Chairman did not state that she did not understand the case. Hence, there was no prejudice caused to the applicant when the case was not heard *de novo*. *Merita Merchant Bank Singapore Ltd v. Benatulin Timur Sdn Bhd & Anor* (foll).

(2) The Chairman had accepted the fact that there was indeed a reorganisation exercise in the Securities Department. She was not convinced that there was a redundancy because she took into account that the 1st respondent was transferred to a demoted position when the evidence revealed that the position of General Manager of Facilities, Security & Risk Management became redundant. Her findings on redundancy were wholly unsupported by the evidence. She did not evaluate the applicant's evidence but had only considered the claimant's evidence in reaching the above conclusion. She failed to

consider the undisputed evidence that one Lim Woi Hooi and one Mithran were appointed as Security Managers in Penang and KLIA respectively, which made it redundant for the 1st respondent to be in charge of security in those States. That was why he was offered a post as Security Manager in Kuala Lumpur, but with the same salary and benefits he previously enjoyed. Since the applicant's pleaded case was that the 1st respondent's position was made redundant, he was offered an alternative job with the same salary and benefits which he rejected and he walked out of the company despite instructions to report for duty, it was incumbent upon the Industrial Court to make a ruling on whether that was the case here. The Industrial Court's failure to make a ruling on the reasons advanced by the applicant, and instead ruling on constructive dismissal which was not the reason advanced by the applicant for the 1st respondent's dismissal, was an error of law affecting its jurisdiction. *Goon Kwee Phoy v. J & P Coats (M) Sdn Bhd* (foll).

(3) The Industrial Court also committed the following errors in relation to the award of backwages and compensation: (i) the 1st respondent had worked for the company for less than three years, not four years as mentioned by the Chairman. Therefore, it was wrong to allow four months' pay as compensation *in lieu* of reinstatement; and (ii) failure to consider the fact that the 1st respondent had a part-time job as a Security Manager for six months at a salary of RM5,000 after receiving the letter dated 3 June 2002. *Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor* (foll).

Case(s) referred to:

Bolton v. Bolton [1949] 2 All ER 908 ***(refd)***

Chua Chee Chor v. Chua Kim Yong & Ors [1962] 1 LNS 29 PC ***(refd)***

Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor [2001] 3 CLJ 541 FC ***(foll)***

Hitechniaga Sdn Bhd & Ors v. Hong Kean Yong [2005] 1 ILR 724 ***(refd)***

Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 1 LNS 30 FC ***(refd)***

Kathiravelu Ganeson v. Kojasa Holdings Berhad [1997] 3 CLJ 777 SC ***(refd)***

Merita Merchant Bank Singapore Ltd v. Benatulin Timur Sdn Bhd & Anor [2004] 3 CLJ 44 HC ***(foll)***

Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***

A *Steven Lim Kok Hoe v. England Optical Group (M) Sdn Bhd [2007] 2 ILR 204* ***(refd)***
Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344 FC ***(refd)***

Legislation referred to:
B Industrial Relations Act 1967, s. 23(6)
Rules of the High Court 1980, O. 53 r. 3(2)

For the applicant - Jeevaratnam; M/s Jeevaratnam & Co
For the 1st respondent - En Ananthan; M/s Tengku Azlina, Rao, Low & Assocs
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Reported by Suresh Nathan

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JUDGMENTS

Hadhariah Syed Ismail JC:

[1] This is an application by the applicant for an order for *certiorari* to quash the Award of the Industrial Court dated 24
E March 2009 wherein the learned Chairman held that the 1st respondent was constructively dismissed by the applicant and awarded a total sum of RM252,000 as back wages and compensation *in lieu* of reinstatement.

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Background Facts

[2] The 1st respondent was employed by the applicant (company) as a Senior Manager, Security & Risk Management *vide* a Letter of Offer dated 16 August 1999. He was responsible for all aspects of security and risk management throughout Malaysia.
G He was later promoted to the position of General Manager of Facilities, Security & Risk Management effective 1 July 2001. Due to reorganization exercise in the company, the position of the 1st respondent's became redundant. The company issued a letter dated 3 June 2002, signed by the General Manager, Human
H Resource on behalf of the Managing Director of the company, informing him that his position will be redundant and his services will no longer be required with effect from 3 June 2002.

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[3] He was offered an alternative position as a Security of Facilities Manager-Kuala Lumpur with the same salary and benefits he currently enjoyed. He was requested to report for duty in his new position on 10 June 2002. The 1st respondent orally indicated that he was not interested in the position.

[4] When the 1st respondent did not confirm the acceptance of the new position on 10 June 2002, the company wrote another letter dated 3 July 2002 to him stating that his last day of service will be 10 July 2002 and regard that letter as a formal notice of termination. Not only the 1st respondent did not respond at all to the company's two letters, but he also did not report for duty as required by the company. Instead he walked out of the company and lodged a complaint with the Industrial Relations Department, claiming constructive dismissal.

Grounds Of Application

[5] The grounds on which the relief was sought by the applicant's company are contained in a statement filed pursuant to O. 53 r. 3(2) of the High Court Rules 1980. Briefly, the complaint of the company was that the Industrial Court had erred in law and jurisdiction as follows:

1. In not making a ruling on the issue of redundancy.
2. In making findings that no reasonable person or body in a similar circumstance would have made.
3. In awarding compensation which was contrary to established principles of law.
4. The learned Chairman of the Industrial Court who handed down the award was not the Chairman who heard the case.

The Issue

[6] The issue to be determined by this court is whether the 1st respondent was constructively dismissed or was it a case of redundancy.

Function Of Review Court

[7] It is an established law that a court in exercising its judicial review can only interfere with the findings of the Industrial Court if it can be shown to the satisfaction of the court that the findings

were unreasonable in the sense that no reasonable person or body of person could have reached them – *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9; *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344.

Should The Case Be Heard *Denovo*?

[8] Before I proceeded to examine the merits in this application, I must first address the issue of the award being handed down by a chairperson who did not hear the case. The chairperson who sat throughout the trial was Yeoh Wee Siam (as she then was). But the award was handed down by Dato' Mary Shakila Azariah.

[9] Mr Jeevaratnam, learned counsel for the applicant submits that the applicant was prejudiced as the learned chairperson who handed down the award merely based her decision on the notes of evidence and had no opportunity to observe the demeanour of all the witnesses while giving their testimonies. Mr Jeevaratnam further submits the chairperson erred in:

1. not hearing the case *de novo*; and
2. not calling up the parties to get their consent before handing down the award.

[10] In support of the proposition, he cited *Chua Chee Chor v. Chua Kim Yong & Ors* [1962] 1 LNS 29; *Bolton v. Bolton* [1949] 2 All ER 908.

[11] Mr Ananthan, learned counsel for the 1st respondent submits, neither the applicant averred in their affidavit of their objection nor they write to the court seeking the matter to be heard *de novo*. Mr Ananthan further submits that the true spirit of s. 23(6) of the Industrial Relations Act 1967 is to expedite the trial. There is no error on the part of the chairperson. He relied on the following cases:

1. *Merita Merchant Bank Singapore Ltd v. Benatulin Timur Sdn Bhd & Anor* [2004] 3 CLJ 44.
2. *Steven Lim Kok Hoe v. England Optical Group (M) Sdn Bhd* [2007] 2 ILR 204.
3. *Hitechniaga Sdn Bhd & Ors v. Hong Kean Yong* [2005] 1 ILR 724.

[12] My view, upon reading the English case of *Bolton v. Bolton* cited by counsel for the applicant is this. Firstly, whilst the case shows the approach of the English court seems to be if a case has been part heard before a judge or a magistrate, it is not proper, even with the consent of the parties for another judge to continue the proceedings, it is not known whether the same is true now. Secondly, it is obvious that such an approach is not applicable in our country. I see no reason why we should follow an English case when there are Malaysian cases which bind this court by the application of *stare decisis* principle.

[13] Analysis of several industrial court decisions referred to by the parties here revealed conflicting views as to whether a partheard case should be heard *de novo* or not. But the approach taken by civil court seemed settled. The partheard case is always continued by the next presiding officer from where it was left. In those days, where three to four officers were transferred within a short space of time, one can see three to four Magistrate or Sessions Court Judges hear one case before the case was finally concluded.

[14] Section 23(6) of the Industrial Relations Act 1967 states:

> (6) During the absence of or inability to act from illness or any other cause by the Chairman, the Yang di-Pertuan Agong may appoint another person to exercise the powers or perform the functions of the Chairman and, notwithstanding that the Chairman may have resumed the duties of his office, the person so appointed may continue to exercise the powers or perform the functions for the purpose of completing the hearing of and determining any trade dispute or matter commenced before him.

[15] Given a literal interpretation, it is clear that s. 23(6) allows another chairman to continue hearing a partheard case. To say otherwise would be contrary to the intention of Parliament when enacting the IRA Act 1967 which is to ensure speedy disposal of industrial disputes; see *Kathiravelu Ganeson v. Kojasa Holdings Berhad* [1997] 3 CLJ 777.

[16] Quite apart from the interpretation of the law, I was of the view that irrespective whether it is a civil or trade dispute, the ultimate goal desired to be achieved by any court is speedy disposal of cases. In determining whether a partheard case should be *de novo* or not, the following factors must be taken into consideration.

A 1. there was no undue delay;

2. no hardship to the parties;

3. no extra costs caused to the parties.

B **[17]** As I said earlier, by the principle of *stare decisis*, I chose to follow *Merita Merchant Bank Singapore Ltd v. Benatulin Timur Sdn Bhd & Anor* [2004] 3 CLJ 44. The general principles applicable in handling partheard cases are:

C 1. Unless otherwise agreed to by both parties, the general rule is a judge taking over the conduct of a trial which has been partheard by another judge (by reason of illness, retired, died, transferred or elevated) ought to continue with the trial at the stage from where the previous judge left.

D 2. The onus is on the party requesting the case to be heard *de novo* to satisfy the court that the case merits a *de novo* hearing.

[18] In this case, the case had been concluded before Datin E Yeoh Wee Siam. It would cause grave hardship to order the case to be heard *de novo*. The learned Chairman did not state she did not understand the case. Therefore there is no prejudice caused to the applicant when the case was not heard *de novo*. I therefore conclude that on the ground of *de novo*, there was no merit in the F applicant's contention and it must fail.

[19] Now, I come to the crux of the complaint, namely the reason for the dismissal.

G **Constructive Dismissal Or Redundancy**

[20] On p. 12 of the award, the learned Chairman states:

> On the pleadings before the Court, it does not seem clear what the issues before the Court are *viz* whether the Claimant was H dismissed for reason of redundancy or that the Claimant had been dismissed constructively. However the thrust of the submissions have been on the dismissal of the Claimant constructively by the Company. Hence the Court will treat this matter as one where it has been pleaded by the Claimant that he had been constructively dismissed without just cause or excuse by the Company.

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[21] In this case, the applicant's company had given a reason for the dismissal and that is of redundancy. Therefore it is incumbent on the Industrial Court to enquire whether redundancy was made out. This is in line with the ruling of the Federal Court in *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] 1 LNS 30; [1981] 2 MLJ 129 at p. 136, His Highness Raja Azlan Shah states:

> If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then, the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the Court is the reason advanced by it and that Court or the High Court cannot go into another reason not relied on by the employer or find one for it.

[22] In coming to the conclusion that the 1st respondent was dismissed constructively, the learned Chairman took into consideration:

1. that the company did not provide evidence that it had considered the claimant's previous position in making the transfer or redesignation to Senior Manager.
2. the *bona fide* of the transfer is suspect as the reorganisation only affected the claimant.
3. the transfer was indeed a demotion as his overall responsibilities changed.

But

[23] She failed to consider the facts that:

1. The 1st respondent has clearly indicated that he was not interested in the new job and he walked out of the company despite being ordered to report for duty on 10 June 2002.
2. After the 1st respondent left the company, there was no more General Manager of Security & Risk Management post. In fact, one Mr Lim Woi Hooi was appointed as Security Manager in Penang and Mr Mithran was appointed as Security Manager in KLIA.
3. Although many other employees were recruited, they are not for the post of General Manager of Security & Risk.

[24] For failure to consider the reasons advanced by the applicant's company, learned counsel for the applicant submits the learned Chairman Industrial Court has committed an error of law which affects its jurisdiction and justifies High Court intervention.

[25] In so far as redundancy was concerned, at p. 24 of the award, the Chairman states:

> the Court is not convinced that the claimant's position and job functions was rendered redundant after the reorganization of the securities department.

[26] From the above, it seems the Chairman accepts the fact that there was indeed a reorganization exercise done in the securities department. Of course she says she was not convinced there was a redundancy because she took into account that the 1st respondent was transferred to a demoted position when the evidence revealed that the position of General Manager of Facilities, Security & Risk Management became redundant. As said earlier, her findings on redundancy is wholly unsupported by the evidence. She did not evaluate the applicant's evidence. In coming to the above conclusion, she only considered the claimant's evidence. She failed to consider the undisputed evidence that Mr Lim Woi Hooi was appointed as Security Manager in 2002 in Penang and Mr Mithran was appointed as Security Manager for KLIA. These facts alone will show it is no longer possible for the 1st respondent to oversee Penang and KLIA. The need for him to be in charge of security for the whole of Malaysia does not arise anymore since there are officers stationed at the various states. It would be redundant for the 1st respondent to be in charge of security in Penang and KLIA. That is why he was offered a post as Security Manager in Kuala Lumpur, which position entail responsibility relating to securities covering Kuala Lumpur, Subang Jaya, Port Klang and Johor Bharu, but with the same salary and benefits he enjoyed.

[27] To conclude, I was of the opinion that since the applicant's pleaded case was the 1st respondent's position is made redundant, he was offered an alternative job with the same salary and benefits, which position the 1st respondent rejected and he walked out of the company despite instruction to report for duty, it is incumbent on the Industrial Court to make a ruling whether

that was the case here. The failure of the Industrial Court to make a ruling on the reasons advanced by the applicant, but instead make a ruling on constructive dismissal which was not the reason advanced by the applicant for the 1st respondent's dismissal was an error of law affecting its jurisdiction.

Compensation

[28] One final point raised by the applicant relates to the award of backwages and compensation. It was pointed out that there are two errors committed by the Industrial Court, namely:

1. The 1st respondent had worked for the company less than three years and not four years as mentioned by the learned Chairman. Therefore it is wrong to allow four months pay as compensation *in lieu* of reinstatement; and

2. Failure to consider the fact that the 1st respondent did a part time job as a Security Manager for six months at a salary of RM5,000 after receiving the letter dated 3 June 2002.

[29] Reading the award, I agree entirely with the contention of the applicant. Thus, the learned Chairman had committed a jurisdictional error of law. At this juncture, it is appropriate for me to refer to the Federal Court case of *Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor* [2001] 3 CLJ 541, wherein it was held:

> It is in line with equity and good conscience that the Industrial Court, in assessing quantum of backwages, should take into account the fact, if established by evidence or admitted, that the workman has been gainfully employed elsewhere after his dismissal. Failure to do constitutes a jurisdictional error of law. *Certiorari* will therefore lie to rectify it.

[30] In view of the various jurisdictional errors committed by the Industrial Court, I allowed this application with costs.